NO. 21091

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LUNDQUIST,

Defendant and Respondent,

APPELLANT'S CLOSING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD H. LEVIN
The Clubview Building, Suite 400
10203 Santa Monica Boulevard
Los Angeles, California 90067

Attorney for Plaintiff and
Appellant

NO. 21091

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LUNDQUIST,

Defendant and Respondent.

APPELLANT'S CLOSING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD H. LEVIN
The Clubview Building, Suite 4
10203 Santa Monica Boulevard
Los Angeles, California 90067

Attorney for Plaintiff and
Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Texts

N O. 2 1 0 9 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LUNDQUIST,

Defendant and Respondent.

APPELLANT'S CLOSING BRIEF

BOTH THE MOTION TO DISMISS AND THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE THE AMENDED COMPLAINT DOES NOT AFFIRMATIVELY SHOW ON ITS FACE THAT THERE IS AN INSUPERABLE BAR TO RELIEF

Appellee, at page 38 of his brief, sets forth the rule that a claim will be dismissed only in "the extraordinary case where the pleader makes allegations which show on the face of the complaint some insuperable bar to relief." On page 41 he reiterates this test in slightly different terms: "... where the complaint affirmatively discloses the defect going to the merits of the case, and therefore shows that a cause of action

cannot be stated." Applying the test to the case at hand, Appellee contends that the Appellant's omission of an allegation showing that the fraud alleged was discovered within three years of the filing of the suit, renders the complaint incurably vulnerable to the statute of limitations - that such omission "affirmatively" discloses an insuperable defect. This contention is without support of authority from Appellee's brief.

It is significant that, as a general rule, a plaintiff has no obligation to plead the inapplicability of the statute of limitations. Instead, the defendant must affirmatively plead the statute as a defense. Moore's Federal Practice, p. 1862. California courts, however, require that a plaintiff plead that discovery of the fraud occurred within three years of the commencement of the action whenever the action is filed more than three years after the actual fraudulent conduct. In addition, California courts require the plaintiff to set forth the specific acts of such discovery. Appellant respectfully submits that: 1. The California law in this respect is procedural and should not be applied by this court; and 2. even if the California law was applicable in this case, the failure to comply with the pleading requirement would not produce an "affirmative disclosure" of an insuperable bar to relief

as required for the dismissal of a claim.

The California Rule Requiring the Plaintiff to Affirmatively Plead That The Fraud Was Discovered Within Three Years Of The Commencement Of The Action Is Procedural And Need Not Be Applied By This Court

California courts actually require a plaintiff to plead both the time the discovery was made and the precise facts of such discovery. However, it was decided in Owens Generator Co., Inc. v. H.J. Heinz Co., 23 F.R.D. 121 (N.D. Calif. S.D. 1958) that the California requirement that the specific circumstances of discovery be plead is a procedural one which is not necessary in federal courts. In that case, the plaintiff alleged discovery of the fraud within three years of the commencement of the action but the defendant moved to dismiss the complaint because it failed to set forth the facts attending such discovery. In denying the motion to dismiss because the California rule was procedural and did not bind a federal court, the court stressed the applicability of Conley v. Gibson, 355 U.S. 41 (1957) which stated:

> ... a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Although the court in the Owens Generator case, supra addressed itself specifically to the issue of whether or not the facts of discovery of the fraud must be plead in a federal court, the opinion clearly inferred that the policy stated in the Conley case supra would also prevent an omission of an allegation of when the fraud was discovered from totally barring a claim in a federal court. Appellee has cited absolutely no authority which requires a federal court to apply the California pleading rule at all, let alone in instances where the rule would result in the dismissal of a claim. In fact, the authority of the Owens Generator case is contrary.

Appellant submits that under the facts of this case, where he has repeatedly demonstrated his willingness and ability to prove that discovery of the fraud was within three years of the action, that his complaint was erroneously dismissed for failing to plead avoidance of the statute of limitations.

In Any Event, The Omission Of An Allegation That The Fraud Was Discovered Within Three Years of The Commencement of the Action Does Not Constitute An Affirmative Disclosure of an Insuperable Bar To Relief Justifying Dismissal of the Action

The omission of an allegation that the fraud was discovered within three years of the suit is not an

affirmative disclosure of any defect. In fact, the omission discloses nothing. It does no more than raise the possibility of a bar by the statute of limitations. Clearly, the defect (if it is so deemed) is not insuperable for a simple allegation that the fraud was discovered within three years of filing would remedy the complaint beyond question, and such an allegation is in fact set forth by plaintiff in his pre-trial statement. (Plaintiff's contentions of fact - C. T. 341, etc.)

In his attempt to characterize Appellant's alleged pleading oversight (according to California law) as a fatal affirmative allegation, Appellee's authority is, again, non existent. Though Appellee cites several cases, none are directly in point and some are entirely irrelevant. The following is a brief analysis of the cases cited on pages 41 and 42 of Appellees brief:

Sheaf v. Minn. St. P. & S. S. M. R. Co., 162 F. 2d 110 (8th Circuit 1947) - did not deal with statute of limitations at all. The Court dismissed a claim under the Federal Employer's Liability Act because the plaintiff failed to allege a causal relationship between an unprovoked attack on him by a fellow worker and the asserted negligence of the employee.

De Loach v. Crowley's, Inc., 128 F. 2d 378 (5th Circuit 1942) - did not deal with statute of limitations.

The Court reversed the dismissal of a claim under the Fair Labor Standards Act giving the plaintiff leave to amend to clarify his complaint.

Leggitt v. Montgomery Ward Co., 178 F. 2d (10th Circuit 1949) - did not deal with statute of limitations. The Court held that under Wyoming law the binding over of a criminal defendant by an examining officer to a court is prima facie evidence of probable cause and where it affirmatively appeared on the face of a complaint that the plaintiff, on advise of counsel, waived preliminary examination, the complaint was properly dismissed.

Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd., 185 F. 2d 196 (9th Circuit 1950), cert. den. 340 U.S. 943; reh. den 341 U.S. 912 - Affirmative allegations of the plaintiff in an action for treble damages under the antitrust laws showed that the action was barred by the statute of limitations.

Wright v. Bankers Service Corp., 39 F. Supp. 980 (D.C. Calif. 1941) - at page 983 the Court stated: "The allegations of the complaint show that the alleged fraud was discovered and the plaintiff had knowledge thereof more than three years prior to the filing of the complaint." Such is clearly not the case at hand.

Wright v. Gibson, 128 F. 2d 865 - did not deal with statute of limitations. It held: a judgment

dismissing one count of a two count complaint is not a final decision and is therefore not appealable.

Appellant submits that the foregoing analysis demonstrates the paucity of legitimate authority supporting Appellee's contentions. He has not cited one case where a federal court has dismissed a claim for its failure to allege that the fraud was discovered within three years of the filing of an action. In the absence of such authority, and in view of the federal policy to treat pleading defects most liberally, the judgment granting the motion to dismiss and the motion for summary judgment should be reversed.

LEAVE TO AMEND SHOULD HAVE BEEN GRANTED BECAUSE APPELLANT COULD HAVE CURED ANY DEFECT IN THE COMPLAINT

This court, in Tipton v. Bearl Sprott Co., 175 F. 2d 432 (9th Circuit 1949), has held that although a ruling on a motion to dismiss is good as to a particular complaint, where it is shown that other facts exist which would cure the defects, if alleged, leave to amend should be granted. The court in Topping v. Fry, 147 F. 2d 715 (7th Circuit 1945) stated the principle even more broadly holding that a dismissal without leave to amend should not be granted where there is a possibility of a good complaint being filed. This Court, again, in Sidebotham v. Robison, 216 F. 2d 816, 826 (9th Circuit 1954) further expanded the principle stating that it

should apply even where no request to amend the pleading was made to the district court.

The defect asserted here by the Appellee, if it does exist, is purely a technical one which the Appellant can remedy by amending his complaint and submitting new affidavits. The great weight of authority indicates that the Appellee's plea for a rigid, one-shot approach to pleading be rejected. The Appellant's valuable substantive rights should not be foreclosed by an alleged procedural technicality. Appellant has stated a claim for relief. And in any event Appellant can state a claim for relief and he should be permitted to do so.

SIGNIFICANCE OF JUDGE SOLOMON'S ORDER

The original motions to dismiss and for summary judgment filed by Lundquist were made to Judge Solomon and denied by that judge. Judge Solomon denied these motions with the further statement that it may be that after a pre-trial Order is filed the facts admitted in such order will make the controversy ripe for decision on a motion for summary judgment.

Appellee contends that by reason of the above, Appellant was placed on notice that an amended Complaint was in order (Appellee's brief, p. 5).

Appellant submits that this is a distorted interpretation of Judge Solomon's Order. Appellant urges that on the contrary, Judge Solomon was stating as the law of the case that the complaint was sufficient and that in the absence of appropriate admissions in the pre-trial statement, Lundquist's motions should not be renewed. In the pre-trial statement Plaintiff made no admissions relevant to the motions to dismiss or for summary judgment. Hence Judge Solomon's Order should remain the law of the case. Having relied on Judge Solomon's ruling that the Plaintiff was not vulnerable to a motion to dismiss or to a motion for summary judgment, Plaintiff should not now be thrown out of Court because of such reliance.

Respectfully submitted,

RICHARD H. LEVIN

Attorney for Plaintiff and Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD H. LEVIN